

**WSDOT DBE Contracting Program Following the
Decision of the Court of Appeals in the Western States Paving Rule**

Frequently Asked Questions (FAQs)

Q. What exactly did the Ninth Circuit panel rule? Did the judges tell WSDOT to do something, or stop doing something? Or did they just send it back to the lower court and tell that judge to look at the case again?

A. A three judge panel of the Ninth Circuit Court of Appeals ruled against the WSDOT by a 2-1 margin holding that the current WSDOT DBE race conscious goals are unconstitutional because the agency in establishing the goals lacked sufficient evidence of past racial or gender discrimination in the Washington transportation construction industry. The panel reversed a summary judgment in the WSDOT's favor issued by the federal district court. The panel sent the case back to the district court to determine whether the local government defendants or the state were liable for monetary damages, but the decision regarding the constitutionality of the DBE program is final requiring the immediate halt of the race-conscious DBE goal requirement.

Q. Is Washington State going to appeal to the full Ninth Circuit court? If so, is the ruling stayed until the full court rules?

A. The state has not requested a rehearing en banc (consideration by a larger panel of Ninth Circuit judges) or asked the United States Supreme Court to review the case. The state prefers to focus its resources on completion of a statistical study to further guide activities in the DBE program. The state will consider the panel decision as binding pending further action by the courts.

Q. Did WSDOT fail to implement its program according to federal regulations?

A. Not at all. In fact, WSDOT's program was specifically found in compliance with federal regulations, and also had the approval of USDOT. The court ruled that despite that, WSDOT did not have the statistical or anecdotal documentation to support continuing the race conscious goals.

Q. Do I still need to be certified to be considered for WSDOT jobs?"

A. Certification was never a requirement; it simply made expenditures with such firms eligible to be counted toward the DBE goal. We will continue to require the prime contractors to report accomplishments.

Q. As a DBE, I am concerned that I will no longer be able to use DBE Supportive Services to help my business grow and thrive. Will those services be available?

A. Yes, OMWBE will continue to deliver supportive services under contract with WSDOT, to highway related DBE businesses. The DBE support services program has always been considered a race neutral program.

Q. Do I still need to subcontract with DBE firms?

A. The Department is not setting condition of award project goals on any contracts advertised after the court ruling. Prime contractors will not be required to meet a goal as a Condition of Award on those contracts. However, the nondiscrimination requirements in the selection of subcontractors remain in place and will be enforced by WSDOT. Through its contract language, WSDOT continues to encourage prospective prime contractors to affirmatively solicit quotes from DBE subcontractors.

Q. Does the ruling affect the participation of DBE condition-of-award subcontractors on WSDOT contracts that are ongoing right now?

A. No. On any contract awarded or executed before the Western States decision was handed down, goals will be enforced in accordance with the contract.

Q. Does the ruling nullify the DBE goals on WSDOT contracts that are in the bidding process right now?

A. In an effort to comply with the ruling, the WSDOT removed DBE condition of award goals from contracts to be awarded after the decision was received.

Q. Does the ruling mean that WSDOT cannot put any DBE goals on projects until it does a disparity/availability study?

A. Yes. The study will guide us, depending on what it concludes, in determining whether DBE goals should be reinstituted, consistent with the court's ruling.

Q. Does the ruling require separate goals for the different races, or just one goal for all minority DBEs and another goal for women DBEs?

A. The ruling is not entirely clear on this point. Certain language in the ruling could be construed as limiting eligible DBEs only to members of groups for which sufficient evidence of past discrimination exists in the Washington market place. The ruling does not address the issue of separate goals for different races or a separate goal for women. Separate goals for different groups are explicitly prohibited by the federal DBE regulation. Ultimately, WSDOT will work with USDOT and their legal counsel to implement the DBE program in a manner that satisfies the federal regulation and applicable court decisions.

Q. Does the ruling apply equally to all USDOT-funded projects-- where the federal funds flow through WSDOT--being administered by local jurisdictions?

A. Yes. The case involved three contracts from the City of Vancouver and Clark County. If funding is derived from USDOT funds subject to 49 CFR Part 26 passed through WSDOT, then the ruling applies. Although the decision doesn't explicitly apply to the Federal Aviation Administration (FAA) or Federal Transit Administration (FTA) goals, the WSDOT believes the underlying reasoning applies to its annual FTA and FAA goals and to the WSDOT's use of DBE contract goals on FAA/FTA projects.

Q. Does the ruling have any impact on the goals agencies place on state-funded projects?

A. No. The ruling applied to the federal program. However, since the passage of I-200, state funded projects have voluntary MWBE goals, and so they are not impacted.

Q. What are the next steps WSDOT will be taking?

A. As noted previously, we are currently in the final stages of our availability study. In its ruling, the court also mentioned an anecdotal study. That anecdotal study was not part of the original statistical study, and we are exploring the best ways to gather the anecdotal information. This anecdotal information refers to the real life stories that minority, women, and disadvantaged business owners have encountered. Those experiences could be about the discrimination suffered when attempting to bid or quote as prime or subcontractors; attempting to gain access to credit, insurance, or bonding; or experience with discrimination in the day to day running of your business.

Our annual overall DBE goals are due to the FHWA on August 1, 2005. We will ask USDOT for an extension and submit the appropriate documents at a later time, particularly after we have had an opportunity to complete all the work related to our studies.

We anticipate that our studies will be completed by the end of the summer or early fall. Following receipt of those studies we will review, absorb, interpret, and apply what those studies tell us. We will revise our DBE program using the studies as guidance and submit any changes to USDOT for approval.

Q. What should I, as a DBE or potential DBE, do now?

A. Continue bidding or quoting as you always have. One of the changes you may need to make is to more aggressively market your business to potential primes as well as a potential prime contractor to WSDOT. Document and report any instances where you feel you have suffered discrimination. Contact the WSDOT Office of Equal Opportunity (OEO) (360) 705-7095, for assistance or to file complaints. When we come to you seeking anecdotal information, please respond as completely as possible. If you need any of the business assistance services provided by the DBE Support Services program, contact OMWBE at (360) 753-9693. We also encourage you to obtain and maintain your DBE certification.

For additional information, please contact WSDOT's Office of Equal Opportunity at (360) 705-7090.